IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY DIMEO, III 226 WEST RITTENHOUSE SQUARE PHILADELPHIA, PA 19103	:	
v.	:	NO. 06-1544
TUCKER MAX 143 Madison Avenue New York, NY 10016	:	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

1. Denied. Plaintiff's Complaint speaks for itself in its entirety. As to the balance of the averment, same is denied as a conclusion of law to which no response is required.

2-6. Denied. Said averment is a conclusion of law to which no response is required.

7. Denied. Said averment is a conclusion of law to which no response is required. As to the balance of the averment, it is expressly denied that Plaintiff did not "receive" any of the statements from Defendant and that the statements were simply posted on Defendant's Internet web-site, and strict proof thereof is demanded at the time of trial.

8-9. Denied. Said averment is a conclusion of law to which no response is required.

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WHEREFORE, Plaintiff requests Defendant's Motion to Dismiss be denied.

PROCHNIAK POET & WEISBERG, P.C.

_Matthew B. Weisberg /s/______________

Matthew B. Weisberg, Esquire
Attorney for Plaintiff

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

I. **Operative Facts**:

Defendant hosts and maintains a web site, which, in part, targets private Plaintiff. Defendant's site (**www.tuckermax.com**) is incorporated by reference into Plaintiff's Complaint, which Complaint primarily sounds in Defamation.

As indicated in Plaintiff's Complaint, Defendant has published statements:

(1) Threatening violence and death to Plaintiff;

(2) Alleging Plaintiff committing bribery;

(3) Alleging Plaintiff as a homosexual; and

(4) Alleging Plaintiff as promoting his public relations business through false advertising and fraud.

Since filing suit (as incorporated by reference into Plaintiff's Complaint (¶5(g))), Defendant has posted information about Plaintiff and his family with a view to inciting criminal conduct, including:

(1) Plaintiff's aunt's and grandmother's private phone number;

(2) Posting Plaintiff's cousin's picture in a false light (coupled with lewd

pictures); and

(3) Posting Plaintiff's private contact information (e-mail, phone number and address).

Since the above post-Complaint postings, Plaintiff has received very specific (including time, date, place and method) death threats and Plaintiff's family members have been bombarded with criminally harassing telephone calls.

At trial, Plaintiff will prove that the aforesaid misconduct constitutes Defamation, *per se*, directly at the hands of Defendant as Defendant ***selectively*** publishes said online postings.

Defendant's Introduction seeks to stir the Court by wrapping Defendant's misconduct around the First Amendment and casting Plaintiff as seeking to suppress "the vibrant and competitive free market that presently exists for the internet…." (See Motion to Dismiss, p.2). On the contrary, Plaintiff lives in constant fear for his safety and the safety of his loved ones, has sought related psychological counseling, and has suffered the loss of his privacy, as well as the commercial ramifications that intuitively would arise from his public relations company being cast in the spot-light of public ridicule.

II. **Argument**:

A. The CDA does not provide Defendant immunity from Plaintiff's claim of defamation.

While precedential, Green, supra., does not interpret the CDA as providing instant Defendant immunity for selectively publishing internet postings intentionally targeting Plaintiff. Green v. America Online (AOL), 318 F.3d 465 (C.A.3 (N.J.) 2003) (interpreting the Communications Decency Act, 47 U.S.C. §230(c)(1)).

In Green, John Green attempted to hold AOL liable for a computer program he unintentionally received which caused his computer to malfunction, as well as defamatory communications he received (that he was bisexual and homosexual). In holding AOL immune from liability for its "alleged negligent failure to properly police its network for content transmitted by its users Id. (emphasis added) pursuant to the CDA, the Court held that the CDA "specifically proscribes liability" for decisions relating to the monitoring, screening, and deletion of content from AOL's network. Id. (quoting Zeran v. America Online, Inc., 129 F.3d 327, 330 (4^{th} Cir. 1997)).

Importantly (as will be discussed) and similar to instant Defendant's site, the Court held that "AOL is a private, for-profit company and is not subject to constitutional free speech guarantees." Green, at 472.

Unlike Green, instant Defendant maintains a selectively targeted website (not a passive, free-flowing chat room) wherein Defendant *solicits* content that Defendant then reviews, presumably edits, and then *actively* re-transmits via the site if consistent with Defendant's nefarious objectives.

As Green was a case of "first impression" for the Third Circuit, one must then look to the CDA, itself, to determine whether Defendant's adoption, editing and selective re-transmission of the subject publications merit immunity. A clear reading of the CDA indicates defendant is not immune.

One of the policies the CDA seeks to implement is "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." 47 U.S.C.A. §230(B)(5)). In seeking to protect "'Good Samaritan' blocking and screening of offensive material", the CDA precludes civil liability for:

> Any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. 47 U.S.C.A. §230(c)(2)(a) (emphasis added).

The CDA shields those who are negligent in screening harmful material on the internet, not those who seek out, adopt, edit and re-publish same. Ironically, Defendant cites the CDA as his shield when, in fact, the VAWA (discussed at length in Plaintiff's Motion) creates criminal liability for instant Defendant's conduct-it is that criminal conduct (as indicated by the aforestated implementing policy) which the CDA seeks to prevent.

Notwithstanding the foregoing, Plaintiff seeks to prove at trial that the active selection of the subject defamatory content by for-profit Defendant renders the CDA wholly inapplicable as not even being an " interactive computer service" ("ICS") via Defendant's active selections, as ICS is defined in the CDA. 47 U.S.C.A. §230(f)(2). However, that assertion requires a factual basis unripe for instant Adjudication, but which certainly creates an issue of fact additionally barring the granting of Defendant's preliminary Motion.

B. Defendant's publications are false statements of fact and thus, not protected by the First Amendment.

Defendant alleges that the posts are "nothing other than opinions, inserts, rhetorical hyperbole and the like". (See Motion to Dismiss, p.11). However, Defendant cites Milkovich, which holds the "key inquiry is whether the statements at issue are "an articulation of an objectively verifiable event" that is "susceptible of being proved true or false." Milkovich v. Lorraine Journal Co., 497 U.S. (1990); Id.

Even if for-profit Defendant was entitled to broad First Amendment protection (which Defendant is not-Green, supra.), the subject defamatory statements (which are only examples of the many more contained within this cite) can objectively be proven either true or false and further, are actionable as libel *per se*, which determination is for a jury and not ripe for instant adjudication. The language at issue "is not the sort of loose figurative or hyperbolic language which negates the impression that the writer is seriously maintaining that [respondent engaged in the aforesaid conduct]. Nor does the general tenor… negate this impression…Unlike a subjective assertion, the averred defamatory language is an articulation of a objectively verifiable event." Id. (quoting Scott v. New-Herald, 25 Ohio St.3d 243 (N.E.2d 1986)).

Regarding Defendant's Statute of Limitations argument, Defendant admits at least one (1) of the subject defamatory statements is not barred by the Statute of Limitations. Likewise, Defendant's arguments concerning same are more appropriate for a Motion in Limine than his Motion to Dismiss.

C. The V.A.W.A.

Plaintiff instantly requests this Honorable Court's Leave to Amend his Complaint to eliminate Count II as stated, without prejudice to incorporate same into Plaintiff's claim of Defamation, as well as Plaintiff's prospective new claims for Intention Infliction of Emotional Distress and Defendant's Civil Rico violation.

If granted, Plaintiff's prospective amended complaint cures the balance of Defendant's instant motion (for now) rendering same moot.

PROCHNIAK POET & WEISBERG, P.C.

____Matthew B. Weisberg /s/________
Matthew B. Weisberg, Esq.
Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I, Matthew B. Weisberg, Esquire, hereby certify that on this 26 day of April. 2006, a true and correct copy of the foregoing pleading (Plaintiff's Response) was served First class, regular mail upon the following parties:

Michael Twersky
Montgomery, McCracken, Walker & Rhoads, LLP
123 South Broad Street
Philadelphia, PA 19109

PROCHNIAK, POET & WEISBERG, P.C.

BY: _____Matthew B. Weisberg /s/___
MATTHEW B. WEISBERG
Attorney for Plaintiff